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Supreme Court of the United States

OCTOBER TERM 1958

No. 312

COMMERCIAL STEVEDORING CO. INC.,
Petitioner

—against—

A/S J. LUDWIG MOWINCKELS REDERI,
Respondent

BRIEF OF RESPONDENT A/S J. LUDWIG MOWINCKELS REDERI IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions of Courts Below

The citation of the opinion appealed from, only recently reported, is 256 F. 2d 227.

Jurisdiction

Petitioner claims jurisdiction in part under "Rule 19(b) of the Rules of this Court in its power of supervision under the Federal Judiciary System". Respondent submits that there has been no departure by the Court of Appeals from accepted and usual judicial procedure such as would call for the intervention of this Court's power of supervision.

Questions Presented

Petitioner poses eight questions. These seem to be preoccupied with minor matters, to dwell on issues not reached by the Court of Appeals, to raise issues not urged on the Court of Appeals and to confuse the meaning of the unanimous opinion of the Court of Appeals written by Chief Judge Clark. Respondent submits the following as the only possible questions raised by the petition.

1. Whether this Court is interested in determining or interpreting the intent of two corporate parties to a private contract especially when it has heretofore left such determination of an identical contract to the lower Courts in *American Stevedores Inc.* v. *Porello*, 330 U. S. 446?

2. Whether the decision of the Court below follows this Court's decision in *American Stevedores Inc.* v. *Porello*, *supra* as precedent rather than conflicting with it as contended by petitioner?

3. Whether the decision of this Court in *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U. S. 310, pertaining to marine insurance contracts, would today require this and all other federal courts to construe or interpret the Porello indemnity contract and the identical contract herein under State law?

4. Whether, since the opinion of the Court of Appeals involves only an express indemnity contract, this Court should consider any of the cases cited by petitioner in the last of its "Questions Presented", all of which either have turned, or eventually will be resolved, on theories of implied contractual indemnity or tort indemnity?

Statement

Petitioner in its statement employs a highly selective approach to the facts. In the interest of accuracy, respondent must present the following clarification, although of the opinion that the details of the happening of the accident should not be before this Court on the issue of the express indemnity provision.

It is claimed on page 4 of the petition that the cargo "slipped and fell". The actual finding is that the cargo was "dislodged" by the activities of petitioner's employees (R. 67a). This misconduct was described as "gross negligence" by the only Judge who saw and heard the witnesses (R. 61a-62a). His finding was never criticized or overruled throughout the history of this litigation.

Petitioner suggests that respondent took no precautions to avoid the accident. Actually the ship's Second Officer (Lunde) twice warned the stevedore foreman to be careful (R. 68a). A representative of the ship's agent (Bentsen) instructed, ordered or requested petitioner's foremen to shift one cargo away from the other to prevent fouling (R. 66a).

The Court of Appeals in its second opinion (A 8) pointed out that the stevedore after notice of a potentially dangerous situation

> "* * * failed to take necessary steps to avoid injury, although it was under a duty to do so."

No particularly local flavor attaches to the stevedoring contract as contended by petitioner. Respondent is a Norwegian steamship company with its home office in Bergen, Norway, maintaining a regular transatlantic schedule in foreign commerce.

POINT I

1. THIS COURT IS NOT CONCERNED WITH THE DETERMINATION OF THE INTENT OF THE PARTIES TO PRIVATE CONTRACTS.

2. THE DECISION OF THIS COURT IN *AMERICAN STEVEDORES INC.* v. *PORELLO*, 330 U. S. 446 SERVED AS PRECEDENT FOR THE DECISION OF THE COURT OF APPEALS HEREIN RATHER THAN CONFLICTING WITH IT.

3. *WILBURN BOAT* v. *FIREMAN'S FUND INSURANCE COMPANY*, 348 U. S. 310 IS CONFINED TO THE FIELD OF MARINE INSURANCE CONTRACTS, IS NOT IN CONFLICT WITH *PORELLO* AND WOULD NOT REQUIRE THIS COURT TO DECIDE THE *PORELLO* CASE DIFFERENTLY TODAY.

In *American Stevedores Inc.* v. *Porello, supra,* page 458, this Court expressly left the determination as to the intent of the parties, and applicability of the facts to the indemnity contract to the District Court. This disposition has a two fold significance:

1. Absent other factors this Court has not been interested in determining the intent of the parties to an indemnity contract, nor in determining the applicability of the facts thereto, particularly one identical to the contract in the *Porello* case. This Court expressly left such determination to the lower courts in that case. Following the remand, the District Court in *Porello* v. *United States*, 94 F. Supp. 952 was able to give effect to the indemnity provision, as had the Court of Appeals before it in *Porello* v. *United States*, 153 F. 2d 605, as did the Court of Appeals here 256 F. 2d 227 and as the District Court herein would have if it had not felt bound to apply the law of New York to the contract. Thus, in spite of overwhelming lower Court authority to the contrary, and in the face of this Court's prior indication that it is the function of the District Court to consider, or interpret the con-

tract and determine its applicability to the facts, petitioner once again submits the contract for interpretation to this Court.

2. The very fact that this Court in *Porello* resubmitted the indemnity contract for interpretation, despite ambiguity of language, shows that this Court did not follow the strict New York rule developed in non maritime cases that such an indemnity agreement must be "unequivocal in its terms" to be valid. The statement of this Court in the *Porello* case, 330 U. S. 446, 457 that "Evidence might well have been taken as to the intention of the parties, but was not" would not have been possible under the strict New York rule which indeed was urged upon this Court by petitioner American Stevedores on page 39 of its brief therein. Despite the above, this Court did not summarily reject the interpretation of the Court of Appeals in *Porello* v. *United States,* 153 F. 2d 605 as it would have been required to do under the strict rule since the contract was held ambiguous or equivocal in its terms. Instead this Court preferred that the District Court attempt to give effect to the contract if its meaning could be ascertained. This can be accomplished in a variety of ways: through testimony, by analysis of the facts against a background of maritime usage, by looking into the bargaining position of the parties and the circumstances of making the contract, etc.

It is clear that the New York rule was not followed by this Court in *Porello.* There are two possibilities as to why. Either this Court was following a rule of its own as to resolution of ambiguities in indemnity contracts in general, as it had the power to do,* or this Court did not find the

*This Court has often said that courts applying maritime law are "freer than common law courts in fashioning rules". Halcyon Lines v. Haenn, 342 U. S. 282, 285. They have "traditional discretion" in developing rules. Pope & Talbot Inc. v. Hawn, 346 U. S. 406, 409. This Court noted in Wilburn Boat, 348 U. S. 310, 314, that it had "fashioned a large part of the existing rules that govern admiralty."

New York rule applicable to the particular contract before it.

As to the second it may be said that the contract herein contains a very temperate indemnity provision. On the other hand the strict New York rule referred to as an "unswerving canon" by Judge Learned Hand in *Mostyn* v. *Delaware L. & W. R. Co.*, 160 F. 2d. 15; 18-19 reaches its fullest vigor and justification in cases where one or more of the following obtain, (a) the indemnitee is solely negligent, (b) the language of the indemnity provision is sweeping in terms, (c) the indemnitee is the actor, (d) the indemnitor's negligence is not an express condition to the operation of the agreement.

See cases cited by petitioner *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 39; *Semanchuck* v. *Fifth Avenue and Thirty-Seventh Street Corp.*, 290 N. Y. 412, 419; *Mostyn* v. *Delaware L & W R. Co.*, 160 F. 2d. 15, 18-19; *Shamrock Towing Company* v. *Tully and DeNapoli*, 91 F. Supp. 239, 245-246; *The Zeller No. 4*, 74 F. Supp. 538, 541; *Rice* v. *Pennsylvania Railroad Company*, 202 F. 2d 861, 862.

As to the above authorities it may be said that this Court's decision in *Porello*, not the decisions of any lower federal or state court construing other indemnity contracts, is the best precedent on how this specific contract is to be interpreted. Further, the contract here is not an "exemption from liability" contract as in *Boston Metals Co.* v. *"The Winding Gulf"*, 349 U. S. 122, 123 and *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85. It is of an entirely different nature than those in the cases above because (a) the agreement cannot take effect unless the stevedore is negligent, (b) this must occur during performance of services rendered by the stevedore, (c) the stevedore in such a situation is the actor while the ship is in a passive role.

Significantly in *Mostyn* v. *Delaware L & W R. Co.*, p. 160 F. 2d 15, 18-19, Judge Learned Hand had a similarly moderate indemnity contract before him and indicated that he might have come to "the opposite conclusion" if not constrained by the New York rule to bar indemnity because the contract was ambiguous in its terms.

This Court in *Porello* did not follow the strict rule nor did the Court of Appeals below which looked beyond the bare terms of the contract. Respondent submits that the following factors assisted the Court below in its determination that the contract was clear under the circumstances.

(a) The Court construed the agreement in the light of the facts and found it at least applicable to the state of facts herein. It noted (A8) that in *Porello*, as here, the shipowner "created a potentially dangerous situation and the stevedore, after notice, failed to take necessary steps to avoid injury, although under a duty to do so." Petitioner is apparently of the view that it was under no obligation to do anything but continue its negligent practice of striking one cargo against another.

(b) The terms of the indemnity agreement restrict it to accidents arising out of the performance of activities required of the stevedore by the contract. Finding of Fact No. 7 (R. 61a) by the original District Court which was never criticized or overruled by either Court of Appeals noted that

> "The superintendence and direction of the stevedores' work was entirely that of the respondent stevedoring company which employed the men, including the libelant."

Thus a certain control or dominion over the work must be exercised by the stevedore and makes reasonable the con-

struction that the latter should make the vessel whole for injuries occurring during the assertion of that control.

(c) In *Porello* v. *United States*, 94 F. Supp. 952, 955 and *Muratore* v. *United States*, 100 F. Supp. 276, 285 the stevedore was noted as having the primary duty to furnish its employees with a safe place to work. Indeed the former president of the stevedores herein (Bartlett) who signed the contract for petitioner admitted (R. 74a) that the stevedore acts as an expert in cargo handling, that its responsibility is to see that the cargo is properly loaded and discharged whatever the case may be, and that this, as well as safety is a primary requisite and responsibility of the stevedore who takes the job from the shipowner. This concession as to the stevedore's wide responsibility reinforces the argument that the shipowner can reasonably expect indemnification for all accidents occurring during the performance of the stevedore's operations and involving the stevedore's negligence.

(d) The contract was prepared "clause by clause", (R. 82a) by Lon Hudson, late president of petitioner and an officer of both petitioner and respondent's agent at the time the contract was made and thereafter. Petitioner is a subsidiary of respondent's agent in New York, Cosmopolitan Steamship Company. The latter signed the contract for respondent. The second District Court noted the interlocking officers of petitioner and Cosmopolitan and the lack of arms-length dealing between the two. (R. 97a-98a)

Rules of construction should certainly favor the resolution of ambiguities in the contract in favor of the Norwegian principal, who left the making of the contract to its New York agent, and against the mutual Commercial—Cosmopolitan interests.

(e) An ambiguous contract is not so ambiguous as formerly after it has been determined to convey a definite

intent. The contract herein was made in 1939. An identical contract was construed twice in the extensively litigated *Porello* case, once by the Court of Appeals 153 F. 2d 605 in 1946, and once on remand to the District Court 94 F. Supp. 952 in 1950. Despite all this, the language of indemnity was never changed herein to conform to petitioner's intent declared at the second trial in 1956. This can certainly be viewed as evidence of acquiescence by petitioner in the construction given in the *Porello* decision.

(f) The shipowners partial negligence did not prevent this Court from implying an indemnity contract in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124; and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co. Inc.*, 355 U. S. 563. In such a setting no policy reason apparently exists requiring a strict construction of an express indemnity provision where the shipowner is also partially negligent.

In the light of all the foregoing it becomes absurd for petitioner to claim that the Court of Appeals decision creates a general rule of law that an indemnitor is liable for the negligence of his indemnitee in the "absence of proof to the contrary". Patently the Court of Appeals was only concerned with the particular contract before it, and after viewing many, if not all, of the foregoing circumstances found petitioner liable "in the absence of proof to the contrary".

3. The point is now reached where it must be determined whether this Court, deciding the *Porello* case today, would be required under the *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.* case supra to apply the strict rule of construction applicable in New York.

A reading of the *Wilburn* opinion and the comprehensive analysis thereof by the Court of Appeals below makes it clear that in *Wilburn* this Court intended to deal only with

the limited area of marine insurance and that the decision is attributable to the traditional regulation of insurance by the States.

Apart from the above, other decisions of this Court indicate no broad breakdown of maritime law. Thus in the field of maritime tort, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 and *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406 involved maritime rules of liability which governed respondent's duties and obligations to Manuel Amador herein.

In *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co. Inc.*, 355 U. S. 563 this Court fashioned rules fixing steyedores' obligations to shipowners based on a theory of implied contractual indemnity without being concerned as to where the contract was made, was to be performed or the forum. New York has expressly acknowledged the application of maritime rather than state law in maritime cases. *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 323, 324. Logic and symmetry of decision require no different result as to express indemnity provisions in maritime contracts than to implied indemnity provisions in maritime contracts, or maritime torts, and *Wilburn Boat* manifestly reaches no such arbitrary result.

POINT II

PETITIONER RAISED NO ISSUE OR QUESTION IN THE COURT OF APPEALS AS TO THE PROPRIETY OF THE DISTRICT COURT'S REJECTION OF ITS EVIDENCE OF INTENT. THE DISTRICT COURT'S RULING WAS AMPLY SUPPORTED IN ANY EVENT.

There is not so much as a line of print in petitioner's brief in the Court of Appeals challenging or questioning the District Court ruling that the testimony of petitioner's two

former presidents as to their intent with respect to the indemnity contract was "utterly unpersuasive" (R. 98a) nor did petitioner cross appeal on this issue.

Now that the Court of Appeals has sustained the District Court's rejection of this testimony petitioner seeks to employ this Court as an alternate Court of Appeals to review the District Court's findings. Petitioner misconstrues the function of this Court.

The lack of merit in petitioner's argument is all the more apparent when reference is had to the District Court opinion. That Court noted that the two presidents of petitioner said it was their intent when signing the contract to indemnify only for the stevedore's sole negligence (R. 94a). The Court pointed out (R. 97a-98a) that the contract had been made sixteen years prior to their testimony; that the man who signed for the shipowner was dead, and that there was a lack of arms-length dealing between petitioner and respondent's agent which wholly owns petitioner (discussed in previous point). Each officer admitted that they never corresponded with respondent in Norway as to their private intent, apparently locked in their bosoms for 16 years and only disclosed when threatened with a claim for damages on this contract (R. 79a-81a and 84a). Further the testimony of one of these witnesses (Bartlett) as to the wide responsibility and control of the stevedore refutes his own testimony that the indemnity contract be given such a narrow interpretation (R. 74a).

Also undermining petitioner's contention that it intended to indemnify only in the event of petitioner's sole negligence is a retrospective view of the state of the law in 1939, when the contract was made.

In April, 1946 this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 for the first time imposed liability without fault on a shipowner for a longshoreman's injury.

Thus, prior to *Sieracki* the shipowner had to be in some measure negligent before recovery could be had against him. If he were, then of course, the stevedore could not be solely negligent. In 1939, therefore, a promise to indemnify the shipowner for the stevedore's sole negligence would be an utterly empty undertaking. Despite this, petitioner contends that this contingency was the only one in line with its intent.

Also not raised in the District Court or the Court of Appeals was the claim that an entirely diverse clause in the contract referring to "any negligence" of the stevedore was somehow determinative of the construction of the indemnity clause which refers to "the negligence".

The District Court ruled herein that the insurance policy submitted did not cover the indemnity contract and even if it did that it was not ". . . any indication of the intent of the parties . . ." (R. 99a).

Petitioner agreed with this ruling in its brief below p. 44.

> "As this policy does not cover or even mention the contract between Mowinckels and Commercial Judge Edelstein correctly held that it was not any evidence of intent."

Petitioner (page 17) adopting this same language now amends it to change the ending:

> "* * * the District Court correctly held that it failed to prove intent, as contended by Mowinckels."

Thus in the Court of Appeals petitioner agreed that the policy was no evidence of intent at all and now petitioner contends that it was no evidence of intent "as contended by Mowinckels".

POINT III

PETITIONER'S THIRD POINT DWELLS ENTIRELY ON IMPLIED CONTRACTUAL INDEMNITY AND THIS ISSUE WAS EXPRESSLY NOT REACHED BY THE COURT OF APPEALS IN ITS OPINION.

In Point III Petitioner discusses at great length the issue of implied contractual indemnity under the *Ryan* and *Weyerhaeuser* cases supra. However, the Court of Appeals decided this case on the issue of the express indemnity provision and expressly stated that it did not reach the issue of implied contractual indemnity although it was vigorously contested by both parties (A9).

Respondent feels that under the circumstances it would not be contributing anything to assist this Court on any issue before it by rebutting or refuting petitioner's contentions in its Point III. Respondent does admit, however, that the language in each of the Court of Appeals opinions establishes the propriety of the shipowner's conduct in its relationship with the stevedore. Respondent is of the firm opinion that even should this Court grant certiorari and reverse the Court of Appeals on the issue of the express indemnity provision, the Court of Appeals on remand would have no difficulty in awarding indemnity on an implied contractual basis.

CONCLUSION

THE PETITION HEREIN ESTABLISHES NO CONFLICT IN DECISIONS, RAISES NO QUESTIONS OF WIDE IMPORT AND PRESENTS NO BASIS FOR THE EXERCISE OF THIS COURT'S SUPERVISION OVER THE FEDERAL JUDICIARY SYSTEM. IT SHOULD BE DENIED.

Respectfully submitted,

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